Supreme Court, U.S.
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No. 96-1215

In The

Supreme Court of the United States

October Term, 1996

JILL GAVLE,

Petitioner,

v.

LITTLE SIX, INC., A FOREIGN CORPORATION d/b/a MYSTIC LAKE CASINO, et al.,

Respondents.

On Petition For Writ Of Certiorari To The Minnesota Supreme Court

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF FOR AMICUS CURIAE IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* OF TRIBAL ACCOUNTABILITY LEGAL RIGHTS FUND, INC. IN SUPPORT OF PETITIONER

Pursuant to Rule 37.2 of the rules of this Court, Tribal Accountability Legal Rights Fund, Inc., moves this Court for leave to file the attached brief *amicus curiae* in support of the petitioner. The petitioner has consented to the filing of this brief; however, the respondent has refused to provide consent.

Tribal Accountability Legal Rights Fund, Inc. (hereinafter Tribal Accountability) is a Minnesota not-for-profit organization dedicated to assisting individuals, Native American and non-Native American alike, that are adversely affected by Native American tribal officials hiding behind the shield of tribal sovereignty.

Tribal Accountability believes the instant case provides the Court with an appropriate opportunity to re-examine the varied and inappropriate applications of the holding of *Cherokee Nation v. State of Georgia*, 30 U.S. (5 Pet.) 1 (1831) by federal and state courts.

A predicate to the defense of tribal sovereign immunity is that the tribe in question (the Shakopee Mdewakanton Sioux Community in the instant matter) possess some significant measure of sovereign capacity. The error perpetuated by the Minnesota Supreme Court and other federal and state courts is the assumption that all Native American tribes possess some significant measure of sovereignty. This is a fundamental error which requires correction and the instant case is an appropriate vehicle to revisit this important issue.

In view of its great familiarity with the issue of tribal sovereignty and wide spread abuses of the defense of tribal sovereign immunity, Tribal Accountability respectfully requests that it be allowed to participate in this case and to file the attached brief *amicus curiae* in support of petitioner.

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Dated: March 1, 1997

STATEMENT OF INTEREST OF *AMICUS CURIAE*

Amicus curiae Tribal Accountability Legal Rights Fund, Inc., a Minnesota not-for-profit organization, is dedicated to assisting individuals, Native American and non-Native American alike, that are adversely affected by Native American tribal officials that use the shield of tribal sovereign immunity as a license to commit tortious acts in commercial activities without fear of paying damages. In the instant matter Petitioner alleged numerous tortious acts against Respondent (a Native American tribal commercial entity), but was unable to proceed in the Minnesota state courts because "the sovereign immunity of the Shakopee Mdewakanton Sioux (Dakota) Community extends to (Respondent) and is a bar to this suit in state court." Gavle v. Little Six, Inc., 555 NW2d 284, 287 (Minn. 1996). Tribal Accountability believes, *inter alia*, that the affirmative defense of tribal sovereignty immunity should not extend to tribal commercial activities and that this is especially true when the tribal group in question has only the illusion of sovereignty.

SUMMARY OF ARGUMENT

A predicate to the affirmative defense of tribal sovereign immunity is that the tribe in question possess some significant measure of sovereign capacity. As a matter of domestic law, this Court determined the Cherokee Nation was a dependent, domestic nation completely under the sovereignty and dominion of the United States. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831). Subsequently, this Court recognized that the Cherokee Nation was a distinct community, occupying its own territory, with boundaries accurately described, within which state law

had no force. *Worcester v. Georgia,* 31 U.S. (6 Pet.) 515 (1832).

Unfortunately, the dependent, domestic nation status was extended to all other Native American tribes without regard to their actual capacity to exercise sovereign power over their internal and external affairs. *See,* e.g., *Williams v. Lee,* 358 U.S. 217, 79 S.Ct. 269 (1959). It is one thing to extend such recognition to the Cherokee Nation with its sophisticated government and significant capacity for commercial intercourse and quite another to extend the same recognition to the Shakopee Mdewakanton Sioux Community with less than 300 members and 293 acres of territory.

Before the affirmative defense of tribal sovereign immunity is extended to a Native American tribe, a factual inquiry must be made into its capacity to exercise internal and external sovereign powers. It is posited that in the instant matter, such an inquiry will reveal the Shakopee Mdewakanton Sioux Community lacks the capacity to exercise any substantial measure of sovereignty.

ARGUMENT

I. A PREDICATE TO THE AFFIRMATIVE DEFENSE OF TRIBAL SOVEREIGN IMMUNITY IS THAT THE TRIBE ASSERTING THE DEFENSE POSSESS SIGNIFICANT SOVEREIGN CAPACITY.

In *Cherokee Nation v. Georgia,* 30 (5 Pet.) 1 (1831) this Court determined the Cherokee Nation was a domestic, dependent nation under the sovereignty and dominion of the United States of America. Subsequently, this Court recognized the Cherokee Nation as a distinct community, occupying its own territory, with boundaries accurately described, within which state law had no force or effect.

Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832). Unfortunately, dependent, domestic nation status was extended to all other Native American tribes without regard to their actual capacity to exercise sovereign power over their internal and external affairs. *See*, e.g., *Williams v. Lee*, 358 U.S. 217, 79 S.Ct. 269 (1959).

Extending domestic, dependent nation status to all Native American tribes is inapposite because not all Native American tribes are equally capable of exercising internal and external sovereign powers. This Court recognized the "nation-like" status of the Cherokee Nation because of the relative sophistication, *inter alia*, of the Cherokee government and society.[1] The Shakopee Mdewakanton Sioux Community cannot make such a claim.

Although *Cherokee Nation v. Georgia*, 30 (5 Pet.) 1 (1831) determined the Cherokee Nation was not an international personality, nonetheless, the physical requirements and juristic qualifications of international personalities provide instructive criteria for evaluating the measure of sovereign capacity possessed by Native American tribes.

To gain acceptance in the society of nations, an aspiring entity must substantially satisfy certain physical requirements: *viz.*, territory, population and government.

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[1] The Cherokee society was quite sophisticated with, for example, schools, newspapers printed in the Cherokee language, courts, criminal and civil codes and government. Nonetheless, even the Cherokee Nation could not withstand the expanding power of the United States of America and was forced to remove themselves on "the Trail of Tears" to Oklahoma. See Swindler, Politics As Law: The Cherokee Cases, 3 Am. Ind. L. Rev. 7 (1975).

In other words, *de facto* existence is a predicate to *de jure* existence.

An international personality must be able to exercise extensive (and in the case of a nation-state, exclusive) control over a certain, defined territory. It is not necessary that the territory be exactly fixed, but it should not be so minuscule as to be considered illegitimate. See D. Grieg, International Law 94 (2d ed. 1976). Moreover, the population must inhabit an area over which the government exercises authority to the substantial exclusion of other, external entities.

Although publicists do not attempt to define the quantity of individuals necessary to constitute a population, generally a sufficiently cohesive population must exist to control the territory claimed and a majority must habitually obey a centrally constituted governmental authority. T. Lawrence, The Principles of International Law §35 (7th rev. ed. 1923). Further, a certain, albeit undefined, level of civilization is required. Dickinson, The Equality of States in International Law 223-29 (1920).

While the law of nations has little concern with the form, character or power of the government of a State, Phillimore, 2 Commentaries Upon International Law 81 (3rd ed. 1879), the government must be capable of providing independent internal leadership, a method of conflict resolution for the population and capacity for adapting to changed circumstances consistent with the requirements of civilization. H. Hart, Concept of Law 89 (1961); T. Lawrence, The Principles of International Law §35 (7th rev. ed. 1923).

The foregoing principles of international law provide criteria for evaluating whether, and to what extent, the Shakopee Mdewakanton Sioux Community has the capacity to exercise internal and external sovereign

powers. Given the fact that the Community has less than 300 members and only 293 acres of territory, it is doubtful that the Community has sufficient sovereign capacity to provide a foundation for the assertion of the affirmative defense of tribal sovereign immunity.

The gravamen of the instant matter is that federal and state courts have treated all Native American tribes alike. They are not alike and they are not equally capable. This Court should revisit the "domestic, dependent nation" decision of *Cherokee Nation* and formulate criteria for evaluating the actual, or true, sovereign capacity of the various Native American tribes and, in turn, determine whether the affirmative defense of tribal sovereign immunity may be available for proprietary, commercial activities.

CONCLUSION

For the foregoing reasons, *amicus curiae* Tribal Accountability Legal Rights Fund, Inc. respectfully requests that this Court grant the petition for a writ of certiorari.

Respectfully submitted,

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